

IN THE MATTER OF the Human Rights Code, R.S.O. 1990, c.
H-19;

AND IN THE MATTER OF the complaint of Richard Persad
dated June 9, 1987 alleging discrimination in employment on the
basis of age, colour, race and ancestry by Sudbury Regional Police
Force, Richard Zanibbi, D.B. MacKay, Denis O'Neill, Inspector
Weston, Inspector Lavoie and Doug Wuksinik;

B E T W E E N:

RICHARD PERSAD

Complainant

- and -

SUDBURY REGIONAL POLICE FORCE, RICHARD ZANIBBI,
D.B. MACKAY, DENIS O'NEILL, INSPECTOR WESTON,
INSPECTOR LAVOIE AND DOUG WUKSINIK

Respondents

- and -

ONTARIO HUMAN RIGHTS COMMISSION

Commission

BEFORE: Professor M. L. Friedland, Q.C., Chair
 Board of Inquiry

APPEARANCES: Mark Hart
 Counsel for the Commission
 Richard Persad
 On his own behalf
 Jack Braithwaite
 Counsel for the respondents

DECISION

Richard Persad, a Canadian citizen of East Indian and Trinidadian origin, applied to become a police constable with the Sudbury Regional Police Force. He was not successful and, along with the Ontario Human Rights Commission, brings this proceeding against the Police Force, the Chief of Police, and a number of other named individuals. He alleges discrimination on the basis of colour, race, ancestry and age, contrary to section 5(1) of the Human Rights Code (R.S.O. 1990, c. H.19) which provides as follows:

"Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap."

The hearing lasted twenty-two days, including a preliminary motion to dismiss the complaints because of delay. I ruled against the respondents on the delay motion for reasons which are appended to this decision.

The complaint as presented alleges both direct and systemic discrimination. Systemic discrimination can be found under the Code, even though there is no intent to discriminate. The two leading Supreme Court of Canada cases discussing systemic discrimination, sometimes referred to as adverse effect or adverse impact discrimination, are *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.* (1986), 7 C.H.R.R. D/3102 and *Action Travail des Femmes v. Canadian National Railway Co.* (1987), 8 C.H.R.R. D/4210. Similar distinctions are drawn in the American cases: see *Griggs v. Duke Power Co.* (1971), 401 U.S. 424.

In the *O'Malley* case, McIntyre J. stated for the Court (at p. D/3105):

"The *Code* aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant."

And in the *Action Travail des Femmes* case, Dickson C.J.C. stated for the Court (at p. D/4227):

"systemic discrimination in an employment context is discrimination that results from the simple operations of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination."

I am not convinced on the balance of probability that there was either direct or systemic discrimination operating against Mr. Persad in this case.

DIRECT DISCRIMINATION

Richard Persad came to Canada in 1977. He was born and raised in Trinidad. His family had come from India to Trinidad over 100 years earlier. Mr. Persad went to elementary and secondary school in Trinidad, but did not complete Grade 12 there. He then went to New York City in 1970 to attend high school, obtaining his Grade 12 diploma in 1974. In the meantime, he became a commercial airline pilot and worked in the United States as a pilot until coming to Sudbury in 1977. In Sudbury, he drove a cement truck for a large cement company.

In 1982, he went to the Sudbury municipal office and asked for an application to become a police constable. The initial paperwork for applications to the police force were then handled by the regional municipality, not the police. He was told by the secretary to the Regional Personnel Director that they were not handing out applications because there was a hiring freeze.

The same thing happened the following year. Subsequently, in the Spring of 1984, Mr. Persad obtained and filled out an application form. There was no evidence presented that Mr. Persad was treated any differently than anyone else wishing to join the police force in those years. It seems that no hiring was done in 1982 and 1983, but positions opened up in 1984. The next phase was to wait for a call to write the required tests.

There was a federal election in the Fall of 1984 and Mr. John Rodriguez, who had been an M.P. before 1980, was seeking re-election. In the course of Mr. Rodriguez's campaigning, he met Mr. Persad who told him about his difficulty in gaining employment with the police. After the election, Mr. Rodriguez telephoned the mayor and the Chair of the Police Commission about Mr. Persad. There is no direct evidence that these calls brought about the call to come for testing, but they may well have helped speed up the process.

In December, 1984, Mr. Persad, along with a number of other candidates, wrote the required standard tests: a clerical test, a practical judgment test, a cognitive ability test and a short essay. The municipality had a cut-off score for each of the tests. The essay was not marked unless the candidate was successful in the other three tests. The cut-off score for the cognitive ability test was 104. Mr. Persad received 100 points and was notified that his application to join the police force was unsuccessful.

At that time, there was a Police Board policy that one could not rewrite the tests. Mr. Rodriguez went to see the new Chief of Police, Richard Zanibbi, on Mr. Persad's behalf and also to welcome the Chief to the region.

Chief Zanibbi had become the new chief in February, 1985. Prior to coming to Sudbury, he had for three years been the Deputy Chief of the Nepean Police Force and before that he had

been with the Peel Regional Police, starting as a recruit and working his way up to staff inspector.

John Rodriguez discussed with Chief Zanibbi Mr. Persad's position and the lack of visible minority police officers in Sudbury. The Chief expressed a similar concern and said that one of his first priorities was to attract First Nations persons to the force. The Chief took up Mr. Rodriguez's offer to introduce him to members of the White Fish Lake Indian Band Reserve. This was the first of many outreach programmes introduced by Chief Zanibbi.

I was impressed by Chief Zanibbi's evidence before this tribunal. I believe that he wanted the police force to reflect the community to a greater extent than it then did, particularly with respect to aboriginal officers. In my opinion, he sincerely believes that a more representative police force would be a better police force.

As a result of Rodriguez's visit, Chief Zanibbi wrote to the Sudbury Police Services Board asking them to rescind their 1976 resolution preventing the rewriting of the tests. In December, 1985, Mr. Persad and an aboriginal candidate wrote the tests. They were the only candidates to write that month. No doubt, Chief Zanibbi's concern had influenced the timing of these tests. The aboriginal candidate passed the various tests and went on to become a member of the Sudbury Police Force. Once again, Mr. Persad did not reach the required 104 points on the cognitive ability test, this time receiving 99 points.

The hiring of a native constable was the subject of a story in the *Toronto Star* on June 1, 1987, stating that Sudbury and Toronto were the only cities in Ontario with native constables. In the article, Deputy Chief Denis O'Neill, who had come to Sudbury after Chief Zanibbi, is reported to have stated: "The best way to police any community is to have members of the

ethnic community on the police force I think there is a growing need among natives--and all ethnic groups--for representation on municipal police forces." These statements, it should be noted, were made *before* the complaint was filed with the Human Rights Commission and even before Mr. Persad had been notified that he was not successful on his final interview.

Mr. Persad did not give up. He and Mr. Rodriguez saw the Regional Personnel Director and each separately saw Chief Zanicchi. "I would certainly have liked to have seen Mr. Persad be successful," Chief Zanicchi testified, but "the process would be the same for Mr. Persad as any other candidate."

In December, 1986, Mr. Persad wrote the tests for the third time. This time he was successful on all the tests--he received a score of 107 on the cognitive ability test--and went to the next stage of the process.

This stage consisted of an interview by Sergeant Dennis MacKay. Sergeant MacKay conducted a 3/4 hour interview with Mr. Persad. He graded him on 8 designated categories from "attitude" to "maturity". On three of the categories (appearance, intelligence and maturity) Mr. Persad received 15 out of 20 points, which is an "above standard" rating. On the remaining characteristics he received the "standard" mark of 10. There is a further category called "suitability" for which Mr. Persad received 65 out of a total of 89 points, i.e., about 74%. Other points were awarded for categories such as language ability, education, previous police experience, as well as age, which I will discuss more fully later. All these points are added to the various scores received on the four earlier tests and a total score given. In order to go on to the next stage, the candidate must receive 70% of the total possible points, that is, 630 points out of 900. Mr. Persad received only 566 points.

At the request of his supervisor, Sergeant MacKay went to Mr. Persad's home on Friday afternoon, February 27, 1987. The evidence is not clear whether he went there to tell Mr. Persad that because of his overall score he would be unsuccessful in his attempt to become a police officer and to steer him into applying for a court security officer's position or whether he went to conduct what is called a "home visit". The "home visit" is common practice in many police forces. It is said to be designed to give other family members the opportunity to ask questions about what is involved in police service and to allow the police to determine the level of support of the applicant's career choice. As a by-product, it gives the police another opportunity to observe the character and habits of the applicant. The purpose of a home visit is not clear in normal circumstances. It was even less clear in this case.

After the visit, Sergeant MacKay requested a letter of rejection, but before it was sent out Chief Zanibbi intervened in the process and requested that Mr. Persad be permitted to continue through the complete process, which included physical, medical and psychological tests and a final interview before a three-member panel. Chief Zanibbi's intervention had been prompted by a further call from John Rodriguez expressing concerns Mr. Persad had relayed to him about the home visit.

In March, 1987, Mr. Persad passed the medical, physical and psychological tests and on April 16th appeared for the final interview. Each of the 10 candidates that reached the final interview stage was given a half-hour interview before a selection panel consisting of Deputy Chief Denis O'Neill, Inspector Robert Weston and Inspector Stephen Johnson. There were five positions available. Mr. Persad was ranked 8th and was not recommended for the position.

Each of the three interviewers asked questions and independently assigned points to various categories, such as voice and speech, tact, and judgment. Each was worth a maximum of 20 points for a total of 160 for each assessor or 480 for the three assessors. Surprisingly, the category of "suitability" was also worth only a maximum of 20 points. To be recommended to the Chief and ultimately to the Police Services Commission, a candidate would have to receive 360 points, i.e., 75% of the total possible points. Mr. Persad was assigned 314 points, i.e., 65% of the total and was not recommended by the panel.

Mr. Persad and the Commission allege that the panel did not give Mr. Persad a fair hearing and that he should have received a higher number of points. Moreover, it is claimed, his case was prejudiced by Sergeant MacKay's views, which were probably in the file seen by the panel.

In my opinion, the police acted reasonably and properly throughout the process. Six candidates were recommended for appointment and five of them, four males and one female, were appointed. I examined their resumés and other documents and listened to the evidence of their qualifications given by each of the five appointees. They were all excellent candidates. Three had university degrees, one was very close to a degree, and the other person graduated from Grade 13 with an honours diploma. Their outside activities, such as volunteer work, were also impressive. I have no difficulty understanding why they were selected in this case.

I can also understand why Mr. Persad did not impress the panel and was not recommended. Unlike the other candidates, he only had a Grade 12 degree and this had required more than one attempt. His scores on some of the tests given in Sudbury were marginal, including obtaining only 50 marks out of 100 on the final clerical test. Moreover, he

had pleaded guilty and was convicted of impaired driving in 1981 and the conviction had not at the time been removed by a pardon. (The Ontario Human Rights Code does not bar discrimination on the basis of a Criminal Code conviction that has not been removed by a pardon.) Further, the panel found that he did not communicate his answers very well. In part, this was because he would make statements that could not easily be defended when questioned about them and he would become flustered and give inconsistent answers. The panel asked him about why he said on his application that he wanted to be a police officer since the age of ten, but never took any steps to realize that goal. The panel members were concerned about his responses to this question.

I also found that Mr. Persad did not testify in a frank and consistent manner. There were several issues that came to light during the hearing which Mr. Persad attempted to explain in an unconvincing manner. The circumstances of his leaving his former employment is one such incident. Another is his claim on his resumé that he had been a "freshman" at Laurentian University in 1981. In fact he had attended only a few introductory classes at the beginning of the year in economics and accounting and decided not to go on with the courses. As he attempted to justify the use of the word "freshman" at the hearing he got mired in one inconsistency after another. The same problem occurred when he tried to explain why he had put down on his application form the barely started courses at Laurentian University in economics and accounting work under the heading "highest level obtained". His explanations were not convincing.

Credibility is in issue in the hearing and for the most part I have accepted the police evidence of events. I do not believe that Mr. Persad was deliberately discriminated against.

Indeed, the evidence suggests that he was given some opportunities not available to others because he was a visible minority candidate. The force, I believe, hoped that he would be successful. Sergeant MacKay testified that "it would have been a 'feather in our cap' as far as the police department was concerned to have been able to hire a visible minority that was qualified. That is what we were hoping to do. That is what we were striving to do, to get representation from visible minorities on the force and Mr. Persad came along at the time when we were making efforts to achieve that purpose." I accept Sergeant MacKay's evidence that Chief Zanibbi's policy at the time was, to quote Sergeant MacKay, to "encourage, as much as possible, people from other ethnic organizations, visible minorities or native people, encourage them to apply and also encourage them to be hired."

There was also an allegation that Mr. Persad was discriminated against because of his age. He was 34 years old when he was not hired in 1987. The respondents point out, however, that the successful candidate who ranked the highest by the review panel was also 34 years of age. I do not believe that Sergeant MacKay or Chief Zanibbi, as alleged by Mr. Persad, referred to Mr. Persad's age in a discriminatory manner. Age may have come up, however, in discussions of what Mr. Persad had been doing since high school to further his declared desire to become a police officer and it may have been discussed by Sergeant MacKay in relation to pension arrangements for a court security job.

One complicating factor in relation to age is the form then used by the Sudbury Police Force in adding up points. No points were given to those over 35, 10 points for those 31 to 35, 35 points for those 26 to 30, and 50 points for those 21 to 25 years of age. In the early 1980s, the Ontario Human Rights Code only applied to persons between 40 and 65 with respect to

employment: Ontario Human Rights Code, R.S.O. 1980, c. 340, ss. 4(1)(a) and 26(a). In 1981, it was amended to cover ages 18 to 65 in relation to employment: Human Rights Code, Stat. Ont. 1981, c. 53. Mr. Persad got only 10 points in the age category. Subsequently, but before the complaint was filed in this case,--the exact date is not clear--one of the senior officers on the force, probably Deputy Chief O'Neill, noted that age was being used and that this would probably breach the Human Rights Code. (See Jain, "The Recruitment and Selection of Visible Minorities in Canadian Police Organizations, 1985 to 1987" (1988) 31 *Can. Public Admin.* 463 at p. 479.) Sergeant MacKay was therefore instructed by one of his superior officers to add 50 points to Mr. Persad's score. His total, now 606, was still below the 630 points required to proceed further. In any event, as we have seen, Mr. Persad was permitted to go on to the next stage. The forms used by the Sudbury Police Force were subsequently changed to eliminate age. It should be noted that they also later eliminated height, for which Mr. Persad had received 50 points because he was 5'10" or over. So, the disadvantage he suffered because of the age points was made up by the advantage he received because of his height.

Thus, I do not find proof of direct discrimination. I now turn to systemic discrimination.

SYSTEMIC DISCRIMINATION

The 1989 Report of the Ontario Race Relations and Policing Task Force (Clare Lewis, Chair) showed the low rate of hiring of visible minority candidates in Ontario. The Task Force stated in its impressive report (at p. 60): "The Task Force is unequivocal in its view that the current low rate of visible minority and female recruiting and hiring in Ontario police forces reveals systemic barriers within recruitment and hiring practices."

The Task Force recommended that an employment equity scheme be instituted for police forces in Ontario and this was done by the Police Services Act of 1990 (R.S.O. 1990, c. P.15). As required by the legislation, the Sudbury Regional Police Force filed a detailed Employment Equity Plan. The plan, filed May 1, 1992 covers the period July, 1992 to December, 1993.

The Sudbury plan gives statistical information on the employment of four designated groups: women, disabled, aboriginals and racial minorities. It also sets out in detail the goals of the force, including barrier elimination goals. There was no suggestion at this hearing that the plan as filed was in any way inadequate. The Sudbury Force has been actively recruiting (by advertisement and other methods) visible minority and other designated group candidates.

The Race Relations and Policy Task Force was reconstituted in 1992. They reported in November, 1992 that they were concerned about the rate of change, particularly because of hiring freezes, and recommended that further measures be adopted, stating (at p. 35):

"Despite our reluctance at this time to propose the establishment of timelines, the formula-driven nature of the Regulation and the current absence of hiring opportunities result in a slowness in achieving diversity that must be overcome by special initiatives such as the creation of a Central Police Recruiting Unit, consideration of lateral entry, direct entry, early retirement, application of innovative career path plans and, when opportunities for hiring improve, aggressive racial minority recruitment."

Another important development taking place at the governmental level is the work of the consultants to the Ontario Ministry of the Solicitor General on police recruitment procedures.

In June, 1992 the consultants submitted Phase I of their Report. Its preface sets out the aims of the project, which include:

- "● to review existing recruitment and selection criteria and methods, and consultation data from a broad range of sources;
- to analyze the role and essential tasks of the police constable in the context of the changing needs of our society;
- to identify the essential competencies required of a constable through consultation with police and community representatives;
- to develop valid, reliable and fair tests and methods to assess police constable candidates against the essential competencies identified;
- to develop an overall constable selection process that will be consistent, effective and 'bias-free'; and
- to develop plans for implementing the selection process and evaluating its success ..."

Phase II of the Constable Selection Committee Report is about to appear. Excerpts from the report were introduced into evidence at the end of the hearing. I should add an observation that the Committee is providing a valuable service to police forces. I agree with the conclusion of the 1992 Clare Lewis Report (p. 46) that "adequate resources be given to the development of bias-free selection processes, commencing with the adequate funding of the Constable Selection Project and further projects to develop processes for selection of each police officer rank."

The reports of the Task Force, the employment equity legislation under the Police Services Act, 1990 (R.S.O. 1990, c. P.15), and the Solicitor General's project on the selection of constables show some of the activity and discussions now taking place in Ontario with respect to the hiring of visible minorities.

Against this backdrop I will now explore the complaint that the hiring practices engaged in by the Sudbury Regional Police Force resulted in systemic discrimination. It is not the task of this Board of Inquiry to attempt to redesign the system of constable selection. Rather, I view my task as determining whether systemic discrimination operated in this case. Both the Commission and the respondents presented a number of expert witnesses on the points in issue in this proceeding.

The Commission makes the point that there is now only one visible minority member of the Sudbury Force--.4% of the total uniform positions, whereas in 1986 visible minorities made up 1.8% of the population of Sudbury. There were no visible minority officers at the time of the events in 1987. The problem with drawing an inference from these statistics is that there is no evidence of the number of visible minority candidates who applied for a position.

The Sudbury Force has been able to hire more aboriginal persons, although some have since left. The Force's Employment Equity Plan shows that at present there is one aboriginal constable and one aboriginal sergeant on the Force. This is .8% of the uniform positions compared to an aboriginal population in Sudbury in 1986 of 2.8%. Again, we do not know the number of aboriginal applicants. The numbers of aboriginal and visible minority uniform officers is clearly below the goal stated in the Sudbury Employment Equity Plan. The evidence indicates that they expect to meet their stated goal for these categories.

It is hard to draw any inferences about systemic discrimination in the Sudbury Force based on these statistics and the fact that one visible minority candidate did not get one of the five jobs available in a particular competition. The numbers are far too small to draw any inferences: see *Bhadauria v. Toronto (City) Bd. of Education* (1990), 12 C.H.R.R. D/105 at p. D/129, para. 94; Booth and Mackay, "Legal Constraints on Employment Testing and Evolving Trends in the Law" (1980) 29 Emory L.J. 121 at pp. 157 *et seq.*

Let us look at the specific tests involved. There was no complaint made about the clerical test, the practical judgment test, or the various medical and psychological tests. Most of the expert evidence and argument related to the cognitive (or mental) ability test.

Cognitive ability tests in one form or another are widely used by police forces throughout North America. A survey of state and large municipal forces in the United States reported in 1990 that "almost all (91.9 percent) of the departments surveyed include tests of knowledges, skills, and aptitudes (cognitive tests) as part of the selection process": Ash, Slora and Britton, "Police Agency Officer Selection Practices" (1990) 17 *J. of Police Science and Administration* 258 at p. 262. A Canadian survey also published in 1990 reported that "the overwhelming majority of forces use commercially available standardized tests": Coutts, "Police Hiring and Promotion: Methods and Outcomes" (1990) 14 *Canadian Police College J.* 98 at p. 100; see also J. McGinnis and L. Coutts, "Hiring Practices and Promotional Processes" (1989), a consultants report to the *Niagara Regional Police Inquiry* (1993). Evidence was presented at the hearing that cognitive ability tests are used by the R.C.M.P., by the O.P.P., and by the Metropolitan Toronto Police Force.

It is not difficult to understand why cognitive ability tests are widely used by the police. Cognitive skills are needed for effective policing. Of course, much more is needed, but here we are looking at cognitive ability. A recent article describes some of the skills needed for a police constable:

"The work is complex, frequently dangerous and physically demanding, and emotionally stressful. The job involves problems arising, on the one hand, from the discretion allowed the officer in the use of power and force to do his or her job, and on the other, from the temptations and challenges to the officers' integrity, particularly in larger communities. The job also requires an above-average level of intelligence to successfully complete academy training and to understand and correctly apply the complex matrix of laws that govern society. A high level of intelligence is also required to unravel and solve the problems created by crimes."

Ash, Slora and Britton, "Police Agency Officer Selection Practices" (1990) 17 *J. of Police Science and Administration* 258. Similarly, Phase One of the Ontario Solicitor General's 1992 Officer Selection Committee Report noted the importance of analytical thinking which they described as "the ability to analyze situations and events in a logical way and organize the parts of a problem in a systematic way".

I accept the expert evidence that cognitive ability tests can predict success in both training for the job and on-the-job performance for many occupations. This is particularly so for occupations such as a police officer. As one writer observed: "Cognitive tests are more valid for jobs high on information processing and decision making demands and should be used for

employee selection for such jobs. The same types of tests, however, may demonstrate negative or near zero validities for jobs low on information processing and decision making and should, therefore, not be used for employee selection in such cases": Hakel, "Personnel Selection and Placement" (1986) 37 *Annual Review of Psychology* 351 at p. 372. Police officers are at the higher end of the scale. Moreover, job training for a police officer is important at the beginning of his or her career and, to an increasing extent, subsequently. See *Washington v. Davis* (1976), 426 U.S. 229 in which the U.S. Supreme Court accepted the validity of a cognitive test for the selection of police officers based on its relationship to job training.

A study for the U.S. Office of Personnel Management in 1984 on selecting law enforcement officers concluded: "The results of the study provide a firm foundation for OPM [Office of Personnel Management] use of cognitive ability tests in selecting for these occupations.": Hirsh, Northrop and Schmidt, "Validity Generalization Results for Law Enforcement Occupations", U.S. Office of Personnel Management, July, 1984. The Public Service Commission of Canada studied and reported favourably in 1990 on its Entry-Level Officer Selection Test (ELOST): "Cognitive ability tests in general, and the PSC [Public Service Commission] tests in particular, including the ELOST, are valid and fair predictors of success on entry-level jobs. Individuals who score high on the ELOST will in the future be among the best employees in the Public Service, outperforming those who score lower on the test: "The Entry-Level Officer Selection Test (ELOST) in the Public Service: Fairness Towards Members of Visible Minority Groups", Public Service of Canada, July, 1990. See also the ruling of the Appeal Board under the Public Service Employment Act, *Maloley et al.*, February 1986, upholding the use of the General Intelligence Test (GIT) used to select collections enforcement

clerks for the Department of National Revenue. An appeal to the Federal Court of Appeal was dismissed, November 1986, the Court stating: "We have simply not been persuaded that the Respondent Appeal Board erred in law in arriving at its decision."

The specific cognitive ability test used at the time by the Sudbury Regional Municipality was the Otis Self-Administering Test. This is a 1922 test developed by Dr. Arthur Otis that grew out of tests used for screening American recruits during World War One. It was revised in 1929. The Sudbury Regional Municipality continued to use the Otis Self-Administering Test in spite of the fact that other more modern tests were available, including the Otis-Lennon Mental Ability Test, introduced in 1967.

The respondent's expert, Dr. Tim Gilmor, an industrial psychologist in private practice in Mississauga, conceded that there were better tests available in the 1980s and he would not now recommend the use of the test, but maintained that the Otis Self-Administering Test "is a valid measure of mental ability, even today" (p. 19 of Dr. Gilmor's Report). It was, he said, like an older car which may not be as efficient or elegant as a newer car, but still can get you from Point A to Point B. I note that the Sudbury Police Force now uses a test published in 1946 and last revised in 1963, the General Aptitude Test Battery (GATB). Phase II of the 1993 Constable Selection Committee of the Solicitor General of Ontario also recommends GATB stating (p. 31): "The general cognitive ability factor based on three subtests represents the most appropriate combination for selection of police cadets-in-training and constables".

I have accepted Dr. Gilmor's evidence concerning the validity of the Otis Self-Administering Test. His testimony was in part based on meta-analytic studies of the Otis test that he and Dr. Michael McDaniel of Akron University did specifically for this hearing. For

discussions of the growing acceptance of meta-analytic studies (also called validity generalization), see, e.g., Schmidt, Ones and Hunter, "Personnel Selection" (1992) 43 *Annual Rev. of Psychology* 627; Schmidt, "What do Data Really Mean?" (1992) 47 *American Psychologist* 1173; J. McGinnis and L. Coutts, "Hiring Practices and Promotional Processes" (1989), a consultants report to the *Niagara Regional Police Inquiry* (1993).

There is considerable controversy about the use of cognitive ability tests. See, for example, the recent article by Mark Kelman in the *Harvard Law Review*, "Concepts of Discrimination in 'General Ability' Job Testing" (1991) 104 *Harvard L. Rev.* 1157 and the references cited in the article. The Commission presented expert evidence and argues that cognitive ability tests and specifically the Otis Self-Administering Test are culturally biased. Dr. Bernadette Schell, a professor in the School of Commerce and Administration at Laurentian University in Sudbury, specializing in industrial psychology and communication, expressed the view (at p. 29 of her report) that "the Otis Test seems likely to have been one problem contributing to the final outcome of adverse impact against the complainant".

There is no doubt that most standardized tests are "culturally loaded". For one thing, they require a knowledge of the English (or French) language. The question is, are they culturally biased. (For a discussion of this distinction, see T.G. Gutkin and C.R. Reynolds, *The Handbook of School Psychology* (2nd ed., 1990) at p. 491.) A standardized test like the Otis test may well be unfairly culturally biased when given in a school system for the purpose of streaming students. But is such a test unfair when administered to a candidate for a position with a police force in Canada? Police officers have to operate in a North American culture.

They have to be sensitive to the subtleties of language and the nuances of non-verbal communication.

I was presented with no evidence that East Indians in Canada or the United States score lower on standardized cognitive ability tests. Evidence showing lower scores for Blacks than Whites in the United States may well be attributable to socio-economic and educational factors. In any event, the findings may not be transferable to Canada for Blacks or other visible minority groups, including East Indians.

Let us turn to Mr. Persad and the Otis Test. The Commission argued that Mr. Persad, coming from a different cultural background (his family came to Trinidad from India over 100 years earlier), would score lower than he would have if he had grown up in Canada. He would, it was argued, not be as familiar, for example, with such proverbs as "The early bird catches the worm" used in one of the questions. A professor of anthropology from the University of Toronto, Dr. Ajit Ray, gave evidence supporting the Commission's position. The respondents called the Consul General in Toronto of Trinidad and Tobago, Ousman Ali, who had been a teacher in Trinidad and whose family, like Mr. Persad's, was originally from India.

I accept Mr. Ali's evidence that the educational system in Trinidad is a good one and that Hillview College that Mr. Persad attended has a particularly good reputation. The language of Trinidad and of the school system is English. (Mr. Persad's language at home was also English.) The literacy rate in Trinidad is over 95%. East Indians make up over 40% of the population. Mr. Ali testified that proverbs--to use the example cited earlier--would be known by a Trinidadian. Indeed, an analysis of the three Otis tests written by Mr. Persad shows that he did very well on the proverb questions. He did poorest on the numerical calculations, which

have little to do with one's cultural background. (This is not easy to understand in the light of the fact that he became a commercial pilot.) Thus, I have concluded that the Otis test was not culturally biased against Mr. Persad.

Mr. Ali testified as to Mr. Persad's lack of success at Hillview School. He had to try the entrance exam twice before being admitted and in his final year there (the equivalent of Grade 12 here) he failed each of the five Cambridge G.C.E. examinations he wrote. Mr. Persad would appear also to have had scholastic problems in New York. He took the Grade 12 courses in 1970 but did not obtain his Grade 12 diploma until 1974. So his lack of success on the Otis Test may simply have been because he had difficulty with cognitive ability tests. I should point out that after the events in question here Mr. Persad went to Cambrian College and received a diploma for a two-year program in Correctional Work. He was on the Dean's Honour List each year he was there. He is now successfully employed by the Ontario Department of Corrections.

A key question is whether the cut-off figure of 104 on the Otis Test was fair. It is within the average range. (100 is designed to be the median score for the adult population.) In my view, it is not unreasonable to require police officers to be somewhat above average in cognitive ability. Note that the 104 figure is a cut-off figure. Scores were not used (except in a minor way) to select candidates. The interview process then takes over. The cut-off score selected the pool. The interview for the most part selected the successful candidates. So, the process differs from that used in New York City, for example, where candidates were selected according to their scores and which was struck down by the federal courts because of the adverse impact on minority candidates: *Guardians Association of New York City Police Dept. v. Civil Service Comm'n* (1980), 630 F. 2d 79 (2nd Cir. C.A.). A cut-off score was accepted by the Federal

Court of Appeal in the previously mentioned *Maloley* case. Some writers argue that it is desirable to have a higher cut-off score because of the predictive value of the tests: see, e.g., Coutts, "Police Hiring and Promotion: Methods and Outcomes" (1990) 14 *Can. Police College J.* 98 at p. 117. The Public Service Appeal Board accepted as reasonable a cut-off score that rejected two-thirds of the applicants. Perhaps more by chance than planning, the Sudbury cut-off point did just that. From November, 1983 to December, 1986, precisely two-thirds of the candidates did not get through the initial screening tests. Coutts (at p. 117) suggests that three candidates should be selected for each position available. The tests administered in Sudbury in December, 1986 produced 24 candidates for the five positions, a higher number than Coutts would have recommended. So, the cut-off points then used by the Sudbury police do not appear to be unreasonably high.

What other techniques could be used to select police officers? It is not suggested by the Commission that a lottery system be used. (But see Kelman, "Concepts of Discrimination in 'General Ability' Job Testing" (1991) 104 *Harv. L. Rev.* 1157 at 1222 who, without specific reference to police officers, sees lotteries as the alternative to testing.)

The Commission argues that the tests should be related to the job. There was much discussion by the Commission's expert, Dr. Schell, about a test, the PAT (Police Applicant Test), devised by Gerald Gruber for the Calgary Police Service: see Gruber, "The Police Applicant Test: A Predictive Validity Study" (1986) 14 *J. of Police Science and Administration* 121. The test relates to what police actually do on the job. The concept looks attractive but it has its own biases and might well be unfair to minority candidates because it gives a decided advantage to children of police officers who tend to know better than other candidates what

police actually do. Very few parents or relatives of visible minority candidates are now on Canadian police forces. The examination, for example, includes "police jargon". Although a vocabulary list is given in advance, this may not overcome the possible disadvantage to minority candidates. In any event, Gruber does not argue that the PAT test is necessarily better than an off-the-shelf test.

Finally, we come to the interview process. Many police forces use a single assessor and then a final panel, as in this case. Coutts states (at p. 100): "Initial applicant interviews are usually conducted by a sergeant in the personnel section. In most forces, surviving applicants are then interviewed by a panel of senior officers." I accept Dr. Gilmor's evidence that single assessor and panel interviews, even if somewhat unstructured and not as desirable as structured interviews, have acceptably high levels of predictive validity (pp. 20-22 of his report; see also Schmidt, Ones and Hunter, "Personnel Selection" (1992) 43 *Annual Rev. of Psychology* 627 at pp. 641-2.)

My conclusion, therefore, is that there was neither direct discrimination nor systemic discrimination in this case. The complaint is dismissed.

September 7, 1993

M. L. Friedland